# W. C. Electrical Co., Inc. and Theodore E. Prager, Jr. Case 29-CA-8116

June 30, 1982

# **DECISION AND ORDER**

# By Members Fanning, Jenkins, and Zimmerman

On September 22, 1981, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging employee Theodore E. Prager, Jr., because of his protected concerted activity. The Administrative Law Judge found that employee Prager had not engaged in protected concerted activity and, accordingly, dismissed the complaint. We do not agree.

Respondent, at all times material herein, was engaged in providing electrical installation and repair services. Its employees were unrepresented. Until the events in question here, Respondent had an established policy of providing all its employees with sick pay, and all employees were informed of the policy when hired.

Prager, an employee of Respondent since September 1979, in the past had received sick pay twice. In Prager's May 16, 1980, paycheck, however, there was no compensation for May 13, when he was absent from work because of illness. When Prager questioned William Cambria, Respondent's president, about this, Cambria told him that he had informed the employees 2 months earlier that there would be no more sick pay. Credited testimony established, however, that this May 16 conversation marked the first notice to employees of the discontinuance of the sick pay policy.

Prager talked to all three of his fellow employees-McNamara, Zuardi, and Scaletta-about the sick pay policy during the May 17-18 weekend. Prager testified that he telephoned Foreman William McNamara on the evening of May 16. According to Prager, McNamara agreed that Cambria had not previously announced that the sick pay policy was discontinued. Prager further testified that he told McNamara that he planned to speak to Cambria on May 19 about the sick pay policy and that McNamara also agreed to speak to Cambria. According to Prager, Zuardi and Scaletta also told him in similar conversations that they did not remember Cambria announcing the end of sick pay and that they both agreed to "stand behind him" in speaking to Cambria about the matter.

McNamara, Respondent's witness, did not specifically deny Prager's version of the May 16 conversation, but stated on cross-examination that he did not remember any such conversation. Scaletta acknowledged a conversation with Prager and testified that he told Prager he did not remember Cambria's claimed announcement of the termination of sick pay. Scaletta stated that neither he nor Zuardi responded to Prager's question about whether they would back him when he approached Cambria about the sick pay. As Respondent's witness, Zuardi testified that he also told Prager that he did not remember Cambria making any announcement. Further, Zuardi attested to the veracity of his April 30, 1981, affidavit to a National Labor Relations Board agent. In this affidavit, Zuardi stated that during this same conversation with Prager he agreed to tell Cambria that Cambria had never announced the discontinuance of the sick pay policy.

Prager also testified that, on his way into Respondent's plant on May 19, he told Zuardi and Scaletta that he was going to speak to Cambria about the sick pay and that they consented to his request for support. Both Zuardi and Scaletta admitted that Prager repeated his earlier expressed intention to speak with Cambria about this matter. Zuardi further testified that in response to Prager's request he agreed to tell Cambria that he did not recall Cambria announcing that there would be no more sick pay. Scaletta had no further recollection of this conversation.

The employees proceeded to enter the plant and take their usual pre-work coffeebreak. McNamara was also present. According to Prager's uncontradicted testimony, he told Cambria, "Billy, nobody remembers you saying about sick days." Prager also demanded to be paid for May 13. Cambria told him that all the employees had been told that sick pay would no longer be provided and the issue was

<sup>&</sup>lt;sup>1</sup> The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

closed. At one point during the argument that followed, Cambria admittedly turned to the other employees and said, "You remember what I said, no work, no pay." Cambria further testified that the other employees looked blank and replied, "[W]e're not sure, we don't remember." The other employees soon left the room voluntarily.

Prager and Cambria continued to debate the sick pay issue, with Prager repeating his demand to be paid for May 13. Prager and Zuardi both testified that Prager told Cambria to ask Zuardi about the sick pay policy, but that Cambria refused. Cambria repeated that his decision was final and requested Prager three times to start the day's work. McNamara, who was assigned to work with Prager that day and was standing in the doorway to the next room, also asked Prager to join him at work. Prager continued to refuse to begin work and Cambria discharged him.

The Administrative Law Judge found that Prager's actions were primarily directed at obtaining his 1 day's lost pay and only incidentally concerned with protesting the discontinuance of Respondent's sick pay policy. He found no corroborating evidence for Prager's testimony that his fellow employees had joined or supported Prager. The Administrative Law Judge therefore found that Prager's conduct was neither concerted nor protected. He concluded that Respondent lawfully discharged Prager for his failure to start working.

The General Counsel contends in exceptions that, contrary to the Administrative Law Judge, Prager's actions involved a matter of common concern and that he obtained the support of his fellow employees before speaking to Cambria on May 19 about the sick pay policy. We find merit in these contentions.

Prager was protesting the discontinuance of Respondent's established practice of providing sick pay, clearly a term and condition of employment. It is well settled that activity in protest of the discontinuance of a past practice concerning a term and condition of employment involves a matter of mutual concern. We do not find that this common concern was negated because it coincided with Prager's individual sick pay complaint. 3

In addition, we disagree with the Administrative Law Judge that there is no evidence in the record corroborating Prager's testimony that he obtained the support of his fellow employees before speak-

<sup>2</sup> See, e.g., Milford Manor, Inc., 233 NLRB 1283, 1285 (1977); Rinke Pontiac Co., 216 NLRB 239, 242 (1975).

ing to Cambria about the sick pay policy. As summarized above, we find that there exists substantial credible and uncontradicted testimony that Prager talked to all his fellow employees about this matter before he talked to Cambria and that each of his fellow employees agreed initially to support Prager. Zuardi admitted such support at the hearing and in his prehearing affidavit. Scaletta denied that he told Prager he would support him in a conversation on the weekend preceding May 19, but he did not contradict Prager's testimony that he agreed to support Prager before work started on May 19. McNamara similarly did not directly contradict Prager's testimony that Prager spoke to him on May 16 about the sick pay and McNamara agreed to speak to Cambria about the matter. Accordingly, we credit the uncontradicted testimony of Prager that both Scaletta and McNamara joined Zuardi in assenting to a discussion with Cambria about sick pay.

Finally, we note Cambria's admission that, when Prager confronted him on May 19, Cambria questioned Prager's three coworkers about the alleged prior announcement of the discontinuance of the sick pay policy and they denied knowledge of such an announcement. Respondent's witness Zuardi also corroborated Prager's testimony that Prager told Cambria to question Zuardi about the sick pay policy but that Cambria refused. This evidence suffices to establish Respondent's knowledge of the concerted nature of Prager's complaint.

On the basis of the above, we find that the preponderance of the evidence shows that Prager, on May 19, engaged in actual concerted activity with his fellow employees about a matter of mutual concern by serving as voluntary employee spokesman in protesting the discontinuance of Respondent's sick pay policy. Respondent does not except to the Administrative Law Judge's finding that Prager's discharge resulted from his protest of May 19. We, therefore, find that Prager was discharged because of his protected concerted activity, and that Respondent thereby violated Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

- 1. W. C. Electrical Co., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. By discharging employee Theodore Prager, Jr., on May 19, 1980, for engaging in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.
- 3. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>3</sup> See The Barnsider, Inc., 195 NLRB 754, 760 (1972). Cf. National Wax Company, 251 NLRB 1064, 1064-65 (1980); Tabernacle Community Hospital & Health Center, 233 NLRB 1425, 1428-29 (1977), in each of which an employee's concern was found to be individual, not mutual, where the employee did not contact his fellow employees and the result would not have benefited his fellow employees in any way.

# THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, W. C. Electrical Co., Inc., Queens, New York, its officers, agents, successors, and assigns, shall:

- 1. Cease and desist from:
- (a) Discharging employees for engaging in protected concerted activity.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:
- (a) Offer Theodore E. Prager, Jr., immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (b) Make Theodore E. Prager, Jr., whole for any loss of pay or other benefits he may have suffered by reason of the discrimination against him in the manner established by the Board in F. W. Woolworth Company, 90 NLRB 289 (1950), together with interest thereon as set forth in Florida Steel Corporation, 231 NLRB 651 (1977).4
- (c) Expunge from its files any reference to the discharge of Theodore E. Prager, Jr., on May 19, 1980, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.
- (d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Post at its Queens, New York, place of business copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by

the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## **APPENDIX**

Notice To Employees
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

WE WILL NOT discharge employees for engaging in protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Theodore E. Prager, Jr., immediate and full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Theodore E. Prager, Jr., whole for any loss of earnings he may have suffered as a result of the discrimination against him, plus interest.

WE WILL expunge from our files any reference to the disciplinary discharge of Theodore E. Prager, Jr., on May 19, 1980, and WE WILL notify him that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

W. C. ELECTRICAL CO., INC.

<sup>&</sup>lt;sup>4</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

due based on the formula set forth therein.

8 In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

# **DECISION**

#### STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This proceeding was heard in Brooklyn, New York, on May 4, 1981. Upon a charge filed and served on June 25, 1980, by Theodore E. Prager, Jr., the Regional Director for Region 29 issued a complaint on September 30, 1980, alleging that W. C. Electrical Co., Inc., herein called Respondent, violated Section 8(a)(1) of the National Labor Relations Act, as amended, herein called the Act, by discharging Prager because of the protected concerted activity in which he had engaged. Respondent denies the commission of any unfair labor practices.

Upon the entire record in this proceeding, including my observation of the witnesses, I make the following:

#### FINDINGS OF FACT

## I. THE BUSINESS OF RESPONDENT

Respondent, a New York corporation, was engaged in Queens, New York, in the business of providing electrical installation and repair services. During the year 1979, Respondent performed electrical installation and repair services valued in excesss of \$50,000, of which services valued of 50,000 were furnished to corporations and firms who in turn performed services valued at more than \$50,000 to customers outside of the State of New York; to building management organizations having gross revenues in excess of \$500,000 and who purchased goods valued in excess of \$5,000 from vendors outside the State of New York; and to an agency of the United States. Respondent admits to these facts and I find that it is an employer engaged within the meaning of Section 2(6) and (7) of the Act.

# II. THE ALLEGED UNFAIR LABOR PRACTICES

# A. Facts

Respondent is actually a one man corporation, owned, operated, and controlled by William Cambria. At the time of the events described herein, Respondent had approximately four employees, one of whom being the Charging Party, Prager, who was employed since September 4, 1979. Prager was hired by Cambria who told him at the time, as he did with other employees, that he provided certain benefits including holidays, vacations, sick benefits, and paid sick days for both mechanics and helpers. Of course, there being no union there was no collective-bargaining agreement nor is there evidence that any of these benefits and conditions of employment were incorporated in any document.

Respondent's records reveal that Prager had been out sick on February 4, and March 5, 1980, for which he was paid. Prager worked on May 10, a Saturday, normally considered overtime. On May 13, Prager was out sick. Friday, May 16, was payday and Cambria handed out the checks around 4:45 p.m. Prager's check was in an envelope and he went to the bank to cash it before even looking at it. He then noticed that it was only for 40 hours, and assumed that he had not been paid for his overtime on May 10. He checked this with another em-

ployee, McNamara, with whom he had worked the preceding Saturday and who suggested he go back to Cambria to check it out. He did this and was told by Cambria that the overtime was put in the check instead of the sick day. Cambria further said that he had told the employees 2 months ago that he was no longer giving sick days.

Prager testified that he later called McNamara and asked him if he remembered Cambria saying that there would be no more pay for sick days, and McNamara said he had not heard it. Prager said he then told McNamara that on Monday he would ask Cambria about the sick days and also Blue Shield. He stated that he had similar conversations over that weekend with employees Scaletta and Zuardi. He told them what Cambria said about sick days and both replied they did not hear about it. Prager stated that they told him they would stand behind him on Monday.

On Monday, May 19, Prager arrived about 7:30 a.m. and met Zuardi and Scaletta around the corner from the office. He told them he would say something about sick days and Blue Cross and they said okay. He then went into the office where McNamara was already present. Prager then told Cambria that no one remembered him saying anything about sick days. At this point McNamara, Zuardi, Scaletta, and Prager all were in the office drinking coffee. Cambria insisted that he had told them, and finally said, "This is it." According to Prager, Cambria had waved out the others who went into the backroom and then told him this was final and he should go to work. Prager was to work with McNamara who was waiting for him, but he insisted he would not leave until he was paid. There was an argument and there was some cursing back and forth until eventually Cambria said if he did not like it, there was the door. Prager also stated that, while this was going on, McNamara was urging him to join him at the truck and get to work, but Prager told him that he was not going any place until he straightened everything out.

Anthony Scaletta testified that he had worked for Respondent from December 1, 1979, until December 12, 1980, when Cambria closed down the business. Scaletta said he played ball with Prager and Zuardi during the weekend prior to May 19. Prager told them he was going to talk to Cambria on Monday and asked whether they would back him up. According to Scaletta, neither he nor Zuardi responded to this. Prager also asked both of them whether Cambria had said they were no longer going to get paid for sick days. He told Prager that he did not remember Cambria saying anything about not getting paid for the sick days, but did not recall whether Zuardi said anything.

Scaletta testified that he and Zuardi met Prager on May 19 on the way to the office and Prager told them he was going in and talk to Cambria about getting the sick pay. He did not remember anything else being said. When they went into the office, Cambria was on the phone, he then gave Zuardi and Scaletta job tickets, and at this point, Prager asked about getting paid for the sick day. Cambria said that he had told everybody they were not getting sick pay any more. Prager replied that he never told them that and he wanted his sick pay. Cam-

bria said this was final and he did not want to talk any more. Prager said he still wanted his pay, and Zuardi and Scaletta then left the room and stayed in the supply room. He could hear Cambria and Prager continuing the argument. After a while, Cambria told Zuardi and him to go to their job. They then went to their truck and he did not hear anything further except Prager saying that he was not going out until he got his sick pay. He and Zuardi went to a gas station and while there Prager came by and told them Prager was fired. Finally, Scaletta testified that when hired he was told by Cambria he would receive, among other things, sick pay, and that Cambria never told employees they would not get paid for sick days. In addition, although Scaletta said he was sick on August 12, 1980, subsequent to Prager's discharge, the records show and the parties stipulated that he was not paid for August 12.

William McNamara testified on behalf of Respondent that he was a foreman and was paid a higher hourly rate than the other three employees. He confirmed that, when he had been hired, Cambria told him he would be covered for sick days, but this would be up to Cambria's judgment. He said that on May 19 Prager argued with Cambria about being paid for the day he was out sick, and at some point during the argument he, Zuardi, and Scaletta went into the back room on their own, not at the request of Cambria. He stated that he himself had been paid twice for sick days.

Philip Zuardi also testified at the behest of Respondent. Zuardi is a brother-in-law of Cambria and a cousin of Prager. Zuardi confirmed coming to work with Scaletta, and meeting Prager who said he was going to talk to Cambria about getting paid for a sick day. Prager also asked them if they remembered Cambria telling them that they were not going to get paid for sick days. Zuardi testified that he did not remember Cambria saying that, but put it more positively in his affidavit which states that Cambria never said they would not get paid for sick days. Zuardi testified, as did the others, concerning the dispute and the demands by Prager that he be paid for the sick day he lost, and also stated that he and Scaletta were in the backroom during a good portion of the argument.

Cambria himself testified that payment for sick days was made by him to all employees provided he felt they deserved to be paid, were honest, and worked hard. However, no employees received sick days subsequent to March 5 when Prager had been paid. Cambria said that he had told the employees around that time that they would no longer be paid for sick days. When Prager asked to be paid for a sick day on May 19, Cambria told him that he had discussed it with him the previous Friday night and that was it. Prager insisted that he wanted to get paid and Cambria told him three times to go to his job and when Prager refused, he was fired.

## B. Discussion

The General Counsel contends that Prager was discharged by Cambria for protesting Respondent's stopping the practice of paid sick days. Respondent on the other hand argues that Prager was simply discharged for

refusing to go to work after Cambria asked him three times

The first question is whether Respondent in fact had a practice or policy of paying employees for sick days. Cambria, as a witness, admitted paying for sick days to Prager as well as other employees in the past. It is also established that when employees were hired they were advised of their benefits including payment for sick days. As to the latter, Cambria insisted he told employees that the sick pay benefit would only be received by them on the basis of an exercise of judgment by Cambria. The employee witnesses, that is, Prager, Scaletta, and Zuardi. did not recollect this in that fashion. Finally, as to this point, Cambria claims that, sometime within 2 or 3 months prior to the May 19 incident, he informed the employees he was no longer going to pay them for sick days. All of the three employees referred to above, including Zuardi, a witness for Respondent, had no recollection of being advised of this change by Cambria. On balance, I credit the testimony of the employees and find that they were informed on the date of hire of the sick day payment benefit, that the policy existed, and that employees were not told of any change or cancellation of that policy.

Having found there was a policy in existence of paying employees for sick days, the issue is whether Prager was engaged in an activity in support or seeking enforcement of such a policy and whether that activity was concerted. The Board and some courts have long held that efforts of an individual employee acting alone to enforce the provisions of a collective-bargaining agreement may be deemed "concerted," and thus protected, when the individual's interpretation of the agreement has a reasonable basis.1 The Board has said in such cases that "implementation of such agreement by an employee is but an extension of the concerted activities giving rise to that agreement."2 However, those cases are not available to the Charging Party herein since we are not dealing with a collective-bargaining agreement which normally defines conditions of employment.

However, it has been held that an action by an employee may be treated as "concerted activity," even though participated in by a single employee, provided the action looks to group rather than mere individual action, and includes "some element of collective activity or contemplation thereof" or it is shown "that the individual in fact was acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense." Applying these principles to the instant case I find that Prager was not engaged in concerted activity. Thus, although the record reveals that, prior to his argument with Cambria, he informed his fellow employees Scaletta and Zuardi that he was going to say something about sick days, both of these employees testified, one in behalf

<sup>&</sup>lt;sup>1</sup> N.L.R.B. v. Interboro Contractors, Inc., 388 F.2d 495, 500 (2d Cir. 1967).

Bunney Bros. Construction Company, 139 NLRB 1516, 1519 (1962).
 Wheeling-Pittsburgh Steel Corp. v. N.L.R.B., 618 F.2d 1009, 1017 (3d Cir. 1980).

<sup>4</sup> Aro Inc. v. N.L.R.B., 596 F.2d 713, 717 (6th Cir. 1979).

of Prager and the other called by Respondent, and neither of them told him they would back him up. Prager testified that he specifically asked them whether they would back him up, but the record is devoid of any testimony that they agreed to do so. While all the employees were together in the office with Cambria when Prager brought up the subject, their mere presence is not sufficient to establish that they were "backing him up" or acting in concert with him, or had authorized him to speak on their behalf. Actually they were there because it was their time to report to work and were awaiting their work assignments and the beginning of the workday at 8 a.m. Moreover, when Prager's question to Cambria gave rise to an argument, Zuardi, Scaletta, and Mc-Namara left the immediate presence and went to a backroom, and none of them support Prager's testimony that they were ordered to leave by Cambria. Thus, there is nothing established herein concerning their conduct to indicate that they were joining with Prager, or that he was speaking on their behalf nor did they protest or make any gesture in support of him.5 According to Prager himself, he was arguing with Cambria, insisting that he be paid, and he refused to go to work unless he was paid. It is clear that Prager primarily was seeking a day's pay rather than enforcing an established policy which was only incidental to his contention. I find, therefore, in all the circumstances that Prager's activity, in insisting upon being paid for a sick day, was a personal mission performed on an individual basis, not concerted, and therefore not protected.

Nor do I find merit in the General Counsel's alternate contention that Prager was fired because he caused or attempted to cause a work stoppage in protest of Respondent's refusal to continue the practice of sick days. There is no evidence to support such a contention. The argument that McNamara was waiting around and did not go to work until after Prager was discharged is not probative of this contention. It is clear that McNamara was due to go to work along with Prager in the same truck, that he had the work ticket, and he was waiting for Prager to conclude his argument. In fact, McNamara testified credibly that he asked Prager three times to stop the discussion and to go to work with him.

In conclusion, I find that the General Counsel has not established by a preponderance of the evidence that Prager was engaged in activity that was concerted, and, accordingly, I find he was lawfully discharged for refusing to work and I recommend dismissal of the complaint.

## CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. Respondent has not engaged in the unfair labor practices alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]

<sup>&</sup>lt;sup>8</sup> Eggo Frozen Foods, 209 NLRB 647 (1974).

<sup>&</sup>lt;sup>8</sup> Snap-On Tools Corporation, 207 NLRB 238, 239 (1973).